United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

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P/S

76-1070

In The

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

WILLIAM E. DOULIN,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York

APPELLANT'S BRIEF

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Introduction

This case is about William Doulin, the Chairman of the Orange County Republican Committee, who was convicted of perjury in the Southern District of New York and sentenced to six months imprisonment. His conviction raises the gravest constitutional doubts.

Appellant was called before a federal grand jury in New York City and asked about the disposition of a criminal case in the Orange County Court involving Richard Monell who, after having plead guilty to attempted assault, received a two-and-a-half year prison sentence. As it turned out, this sentence was illegal because Judge Isseks inadvertently sentenced the defendant under the wrong penal provision, so he had to be resentenced. At the resentencing, the District Attorney advised the court that he had received numerous calls from prominent people in the community urging that Monell be treated leniently. Accordingly, Monell was placed on probation.

The Government claimed that Monell's grandmother (Mrs. Grant) paid appellant $1,500 to "fix" the sentence. William Doulin denied before the grand jury that he interceded in the Monell case or that he was paid or offered any money for intervening.

The former District Attorney, the defense lawyer and Monell's grandmother all denied that anyone interceded in the defendant's case. (The Government did not call Judge Isseks.) Monell's girlfriend testified, over objections, that Mrs. Grant said she had contacted William Doulin and that he agreed to help.

Counsel moved, unsuccessfully, to dismiss the indictment because, since the grand jury had no authority to investigate the handling of an assault case in Orange County, the appellant's answers were immaterial. In a word, that is what this case is all

about, except to say appellant went to trial on an eight-count perjury indictment before a jury and the Honorable Robert J. Ward in the Southern District of New York. On November 15, 1975 the jury found the defendant guilty of four counts of perjury.

On January 23, 1976 the appellant received a sentence of two-and-a-half years, six months to be served in confinement, to run concurrently on all counts. A notice of appeal was filed on January 29, 1976 and this Court ordered appellant's brief and appendix to be filed on April 1, 1976; the Government's brief to be filed on May 3, 1976; and argument is scheduled for the week of May 10, 1976.

TABLE OF CASES

Questions Presented

1. Whether appellant's allegedly perjurious answers were material, as a matter of law, since they did not relate to any cognizable federal offense.

2. Whether the trial court's determination that the allegedly perjurious answers were material, as a matter of law, denied the appellant his sixth amendment right to a jury trial on an essential element of the crime of perjury.

3. Whether the unlawful admission of an enormous amount of prejudicial hearsay evidence in appellant's trial denied him the right of confrontation guaranteed by the sixth amendment.

4. Whether counts 2, 5, 6 and 7 of the indictment are multiplicitous.

5. Whether the various trial errors denied the appellant a fair trial.

STATUTES INVOLVED

18 U.S.C. §1623

§ 1623. False declarations before grand jury or court

(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

Added Pub.L. 91-452, Title IV, § 401(a), Oct. 15, 1970, 84 Stat. 932.

18 U.S.C. §1511

§ 1511 Obstruction of State or local law enforcement

(a) It shall be unlawful for two or more persons to conspire to obstruct the enforcement of the criminal laws of a State or political subdivision thereof, with the intent to facilitate an illegal gambling business if—

(1) one or more of such persons does any act to effect the object of such a conspiracy;

(2) one or more of such persons is an official or employee, elected, appointed, or otherwise, of such State or political subdivision; and

(3) one or more of such persons conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels, or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member, or employee of such organization, except as compensation for actual expenses incurred by him in the conduct of such activity.

(d) Whoever violates this section shall be punished by a fine of not more than $20,000 or imprisonment for not more than five years, or both. Added Pub.L. 91-452, Title VIII, § 802(a), Oct. 15, 1970, 84 Stat. 936.

Statement of Facts

On June 25, 1973 and February 12, 1975, William Doulin, the appellant, was called before a Federal Grand Jury allegedly investigating payoffs by gamblers to local police officers in Orange County, mail fraud, and a host of other Federal offenses.*

Specifically, the Grand Jury inquired about the disposition of an assault case against Richard Monell, in 1971, in the Orange County Court, involving a prison sentence of 2-1/2 years, which was later changed to probation. The prosecutor asked William Doulin whether he was ever paid to intercede in that case, or did he intervene in that case, or did he discuss exerting influence in that case, or any other case. The appellant answered "no" to each of these questions.

The sections of Federal law referred to in the indictment under Title 18 are:

Section 1511 (illegal influence of the enforcement of local gambling laws);
Section 1341 (fraudulent use of the mails);
Section 1952 (interstate racketeering);
Sections 201(b), 1503, 1510 (obstruction of the Federal criminal justice system);
Section 1001 (making a false statement to a Federal agent);
Section 1962 (obstruction of Federal law enforcement);
Section 7201 of Title 26 (tax evasion)

In the Spring of 1975 appellant was charged with 8 counts of making a false declaration before a Grand Jury in violation of Section 1623 of Title 18. The indictment's first 3 counts charged him with making false declarations before the 1972 Grand Jury. Listed below is an abbreviated outline of the indictment, with the jury's disposition of each count.

Count 1 Appellant denied discussing with anyone or receiving anything of value to influence gambling law enforcement in Orange County - not guilty.

Count 2 Appellant denied receiving an offer of money or discussing with anyone influencing law enforcement in Orange County or receiving money for any other purpose - guilty.

Count 3 Appellant denied that anyone ever offered him anything of value to influence his conduct in any way whatsoever - not guilty.

Counts 4 through 8 accused the appellant of lying before the 1975 Grand Jury in the following manner:

Count 4 Appellant lied again when he reaffirmed his testimony before the 1972 Grand Jury - dismissed by Court.

Count 4 Appellant denied interceding or being offered or soliciting money to influence a criminal case - not guilty.*

Count 5 Appellant denied that he ever interfered in a criminal case to influence its outcome - guilty.

Count 6 Appellant denied offering to intercede in the Monell case, or speaking with Mrs. Grant about that case - guilty.

Count 7 Appellant denied discussing interceding in the Monell case - guilty.

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*Since the trial court dismissed the original count 4, the indictment was retyped and renumbered when submitted to the Jury. Thus, Count 5 became 4; 6 became 5; 7 became 6; and 8 became 7. For the convenience of the Court we have attached a retyped, renumbered indictment as an appendix to this brief.

The Trial

At the trial, Judge Angelo Ingrassia, the former District Attorney of Orange County; Jerome S. Cohen, the Assistant District Attorney; and Norman Shapiro, the Legal Aid lawyer who represented Mr. Monell, all testified that no one spoke to them about the influencing or "fixing" of the sentence of Richard Monell. Mrs. Grant, Richard Monell's grandmother, testified that she never spoke to Jerome Cohen, Judge Ingrassia; or Norman Shapiro about modifying her grandson's sentence (617, 618). Mrs. Grant, who is 77 years old, swore that she never paid any money to anyone to get Richard Monell out of jail or have him placed on probation (629). She did admit calling Mr. Weisman, the District Attorney who replaced Judge Ingrassia, after the two-and-a-half year sentence was imposed on her grandson.*

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*Mrs. Grant acknowledged withdrawing $1500 from her bank account on March 30, 1971, but proved that this money was given to her son-in-law to purchase a house (635, 637). She explained that the seller of the home purchased was an elderly lady who wanted cash (639). Her son-in-law established that he had received the money in cash, held it for a while, and then deposited it in his bank account, together with $4,400 in checks (683, 694). These funds were used to purchase a house in July and the transaction was verified by his bank records (694). Her son-in-law admitted that Mrs. Grant had talked with the District Attorney and the Judge regarding her grandson's case (672).

On March 5, 1971, after having plead guilty to attempted assault in the second degree, Richard Monell received a two-and-a-half year prison sentence from Judge Abraham Isseks of the Orange County Court (GX-5, 235). As it turned out, the sentence imposed was illegal and Sing Sing Prison would not receive Monell and he was returned for resentencing (91, 48, 151). On March 25, 1971 the defendant was resentenced by Judge Isseks to a term of probation (252). Mr. Weisman, the Assistant District Attorney handling the matter, indicated to the judge that his office had received a number of calls from responsible citizens who urged that the defendant be treated leniently (255).

Judge Abraham Isseks, in giving Richard Monell another chance, stated for the record:

> "You look like a person that should not be put away. For three years you have been out of trouble. Don't let me down, because if you do, you're going to take the longest ride I can give you" (258).

Judge Isseks complimented the District Attorney on the responsible attitude he took, advising the court the defendant deserved another chance (257). Although Judge Isseks testified before the federal grand jury, he was never called by the Prosecution as a witness.

The Government claimed that the modification of Richard Monell's two-and-a-half year prison sentence to probation was

influenced by William Doulin. The Prosecution contended that he was paid $1,500 by Mrs. Grant to intercede in her grandson's case and obtain probation for him.

The Prosecution's whole case was carried by Florence York Hall, who had no personal knowledge of the events but furnished hearsay testimony. A detailed description and discussion of her testimony is contained in the Hearsay Point of this brief.

There was no proof the defendant received any money in connection with this incident and he was acquitted of the perjury counts based on his denial of receiving any money. Furthermore, there was no showing that this incident had any connection with the illegal gambling or racketeering that was the subject of the grand jury investigation.

William Doulin

William Doulin, who is 72 years old and has been married for 53 years, has three daughters, one adopted and two of his own (1090, 1091). He left school in the sixth grade and began working on a bakery wagon delivering bread (1096). Eventually, he became an undertaker after having worked as a fireman for a long time (1096-1101). In 1963, he was elected Chairman of the Republican Committee of Orange County and has served in that capacity until the present time (1106).

There is no way that William Doulin's 72 years of achievement can be squeezed into the space limitations of an appellate brief. However, the high esteem held for him in his community was harvested through a number of distinguished character witnesses. Listed below are the prominent people who vouched for appellant's good character and excellent reputation for truth and honesty.

Hamilton Fish - former all-American football player who subsequently served in Congress for 25 years (1036-1046)

Honorable John J. Reilly - judge of the New York Court of Claims assigned to the Supreme Court Criminal Term; former Assistant Attorney General of the State of New York for 20 years (1047-1052)

Hon. Malcolm Wilson - former Governor and Lt. Governor of New York State and a member of the New York State Assembly for 20 years (1080-1086).

Monsignor Alexander Markowski - priest for 40 years serving in the St. Francis of Assisi Catholic Church in Newburgh, New York (1057-1063).

Thomas Hadaway - 75 year old attorney and former Surrogate of the County of Orange (1146).

Benjamin F. Reed - former Fire Chief of the City of Newburgh (1153).

William P. Ryan - former Mayor of the City of Newburgh for 8 years and presently a furniture salesman (1158).

Appellant denied that Mrs. Grant ever asked him to intercede on her grandson's behalf (1165). Although he acknowledged knowing Mrs. Grant and admitted she had asked him favors from time to time, he denied interfering in her grandson's case (1204).

Motion to Dismiss

After the Government rested, defense counsel moved to dismiss the indictment on the grounds that there was no basis for Federal jurisdiction (1010, 1012). Counsel argued that any alleged irregularities in the Monell case in no way related to the corruption of Federal officials or gambling offenses as defined by Section 1511 of Title 18. The Court, having grave misgivings about Federal jurisdiction, inquired of the prosecution:

> "Should not this matter have been turned over to the state prosecutor to prosecute in the state court where the judicial system had been undercut and subverted?" (1023)

The Court also acknowledged that there was no evidence showing a gambling operation and that certainly Monell's activities in assaulting his victim were not in any way related to gambling (1024). However, the Court eventually concluded that the investigation was appropriate because of the references to tax violations in the indictment (1032).

On November 15, 1975 appellant was acquitted of 3 counts, but convicted under 4 counts of the indictment and on January 23, 1976 was sentenced to 6 months confinement and 2 years probation.

POINT I

THE APPELLANT'S ALLEGEDLY PERJURIOUS ANSWERS WERE NOT MATERIAL AS A MATTER OF LAW SINCE THEY DID NOT RELATE TO ANY COGNIZABLE FEDERAL OFFENSE AND THUS THE INDICTMENT MUST BE DISMISSED.

Appellant's conviction involves a highly significant, but dubious jurisdictional ruling that is bound to carry implications and give direction far beyond the facts of this case. The Grand Jury investigation, as it relates to this case, was unauthorized and consequently appellant's conviction raises the gravest constitutional doubts.

More importantly, this judgment gravely undermines the sensitive relationship that must be maintained between Federal and State authorities and thus calls for immediate corrective action. In a word, this appeal has become the unlikely flashpoint for a most serious threat to the carefully constructed balance between Federal-State relationships.

Preliminary to our discussion of the legal rules that govern this case, attention should be focused on the irrefutable fact that both Federal Grand Juries before which the appellant appeared were without jurisdiction to investigate the matters

about which he testified. Thus, his appearance before both of these Grand Juries was not required and he should not have been indicted for or convicted of perjury.

When William Doulin appeared on June 25, 1973, without counsel, before the 1972 Federal Grand Jury, he was told that the inquiry was concerned with " . . . possible violations of various criminal statutes broadly having to do with the area of official corruption, broadly defined, in Orange County and related counties . . ." (GX 24 at p. 3)." The subpoena which compelled his appearance before the Grand Jury referred only to Section 371 of Title 18, the Federal Conspiracy Statute.

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*The United States Attorney went on to state:

> "That means that the grand jury is concerned with the violations of Federal criminal law that have to do with certain areas as an attempt to influence the enforcement of local gambling laws illegally, or any use of the mails, or any use of the mails in connection with any type of fraud that would involve a fraud on the local government or anything of that kind. In other words, the whole range of possible Federal statutes that could touch upon obstruction of law enforcement or of local government in any way" (GX 24 at p. 3).

When the appellant appeared before the 1975 grand jury on February 12, almost two years later, again without counsel, he was told that the additional grand jury was investigating official corruption in the Southern District of New York.*

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* The U.S. Attorney claimed:

> "The term 'official corruption' as we use it, includes any illegal act performed by public officials or people in quasi-public positions. It includes any violations of federal law, even though that may not go directly to a violation of a public trust. In other words, it may include an income tax violation even though that may not go directly to the violation of a person's public trust or his public position.
>
> This grand jury is also required to, as part of its investigation into official corruption, investigate any attempt to influence the criminal justice system in the Southern District of New York . . . .
>
> This influence on the criminal justice system includes not just gambling cases but any other types of cases where there may be tampering or influencing in the criminal justice system. By that I include any attempts to influence judges or prosecutors or law enforcement authorities or anyone involved in the due administration of justice and anyone who, of course, should not be influenced by anything but his or her own oath of office and duties and responsibilities to the public.
>
> I want you to understand that this grand jury is investigating all of those possible violations, any violations by public officials where they violate federal law" (GX 25 at p.1, 2).

The indictment returned by the 1975 Grand Jury specified a number of Federal offenses enumerated in a footnote on page one of this brief. None of the crimes listed cover state officials or the criminal justice system located in Orange County.*

For that matter, no evidence was ever presented to the trial jury or the Grand Jury of any undue influence of Federal officials or the misuse of the mails, or any other forms of illegal inter-state action. In reality, the Government was inquiring about suspected irregularities in the sentencing of Richard Monell for an attempted assault in Orange County. That is all, and nothing more. The pathetic claim of tax evasion is purely a sham, preposterous and a contention that has never been strenuously pressed by the Government.

A startling example of the lack of Federal jurisdiction in this case is best illustrated by the Government's proof, offered to sustain Count 2 of the indictment, that appellant contacted Judge Ingrassia for the adjournment of a traffic

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*Although Section 1511 of Title 18 makes it a crime for two or more persons to obstruct the enforcement of state gambling laws, there was never a claim nor any evidence submitted that the Monell case involved such circumstances.

case pending before a Justice of the Peace (73, 74). The application for the adjournment was denied. How a federal Grand Jury has jurisdiction to investigate the adjournment of traffic offenses is beyond comprehension! Certainly a truthful answer to this question would not have advanced any authorized inquiry.

In an unbroken series of cases extending over a long stretch of our judicial history, it has been held postulate that before testimony can be considered material it must relate to a valid subject of a Grand Jury's investigation. In other words, if the Grand Jury has no jurisdiction to look into the matter it is investigating, all questions are necessarily immaterial.

In Brown v. United States, 245 F.2d 549 (8th Cir. 1957), a Nebraska Grand Jury interrogated a witness about events that occurred in Missourri, and which had no relationship to Nebraska. Since the Grand Jury could not return a true bill about the events it was investigating, it was acting outside its jurisdiction. Thus, the perjury conviction was reversed because all questions were immaterial.

Obviously, Mr. Doulin's testimony could not in any way influence or impede an investigation which the Grand Jury was without authority to conduct.

The test of materiality established by this Court is whether the false testimony has the natural effect or tendency to impede, influence, or dissuade the Grand Jury from pursuing its investigation. United States v. Stone, 429 F.2d 138, 140 (2d Cir. 1970). Obviously, implicit in this well-formulated rule is the principle that the grand jury's investigation is jurisdictionally sound.

This Court concluded in United States v. Freedman, 445 F.2d 1220 (2d Cir. 1971) that not "every knowingly false statement under oath is perjurious, for such a ruling would eliminate the materiality requirement" (445 F.2d at 1226).* The Court went on to stress that implicit in the materiality doctrine of this Circuit "is the recognition that the 'further investigation' of which they speak must have some probative value connected with the scope of the inquiry" (445 F.2d at 1226). The Court then emphasized:

> "That is to say, in order for a knowingly false statement to be material within the purview of §1621, it must be shown that a truthful answer would have been of sufficient probative importance to the inquiry so that, as a minimum, further fruitful investigation would have occurred" (445 F.2d at 1226-27).

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*The cases construing materiality under Sec. 1621 are equally applicable to Sec. 1623. See United States v. Koonce, 485 F.2d 374 (8th Cir. 1973).

The Court then dismissed four counts of perjury on the grounds that even if the answers had been true, they would not have been "fruitful to the SEC investigation of possible violations of the federal securities laws with reference to stock manipulations . . . " (445 F.2d at 1227; emphasis supplied).

Certainly, in our case, even if William Doulin had talked with the District Attorney or the Judge concerning the sentencing of Richard Monell, such information would not have been "fruitful" to the investigation of violations of the Federal law. This action, even though ill-advised, was not illegal, and does not come within reach of any Federal or state statutes.

In United States v. Mancuso, 485 F.2d 275 (2d Cir. 1973), the Grand Jury's investigation centered on extortion and official corruption involving the construction industry and certain public officials of the City of Batavia, New York, in violation of the Hobbs Act (18 U.S.C. Sec. 1951). In Mancuso, this Court declared that in judging materiality:

> "We are required to examine both the nature of the inquiry at which the testimony was given and the evidence introduced at trial to prove its falsity in order to determine whether a truthful answer could conceivably have aided the grand jury investigation" (485 F.2d at 280, 281; emphasis supplied).

The Court went on to state:

> "The ultimate issue, therefore, is whether the Government has shown that it could possibly have assisted the grand jury if it knew that Mancuso suggested the means of accounting for an attempted "gratuity" to the private architect, Clemons, in connection with a job unrelated to the inquiry. We believe that the evidence totally fails to support such a view. The question posed to Mancuso related to a wholly immaterial event. Neither the answer he in fact gave nor the truth he allegedly concealed could have impeded or furthered the investigation. The question could not, therefore, have elicited a material reply" (485 F.2d at 281).

A finding of materiality must have some basis in the content of the testimony itself. That which is otherwise wholly immaterial cannot become material solely because a prior witness, innocently, but mistakenly led on by the prosecutor, has given the false or erroneous impression that it has some materiality.

Significantly, even though there was testimony, albeit hearsay evidence, before this Grand Jury indicating that Mrs. Grant paid money to William Doulin for his influence concerning the change of her grandson's sentence, it involved no Federal offense, which is why no indictment was ever returned covering that alleged event. There was simply no jurisdiction for the Grand Jury's investigation.

This Court was careful to point out in the Mancuso case, which involved testimony before a grand jury, the following:

> "In each case the Court has examined the factual background to determine whether the question has some bearing on a subject which was material to the proceeding, and whether a truthful answer might possibly have aided the inquiry. We have never permitted materiality to turn simply on whether the question, on its face, could conceivably have evoked a material reply" (485 F.2d at 281 n. 17).

Thus, in our case, it makes no difference that the prosecution might have been investigating the corrupt influence exercised upon state officials in gambling cases located in Newburgh, New York. In fact, here the question clearly related to the Monell assault case which had nothing to do with gambling. Since the Grand Jury had no authority to investigate an assault case in a state court, the questions were not material to an approved subject of inquiry.

The evidence at appellant's trial compellingly demonstrated that the defendant's truthful response to questions inquiring about the Monell case would not have led to further

"fruitful" investigation. Even though the Government may have believed that there was such a connection when the defendant was called before the Grand Jury, the materiality of the testimony is determined in light of the factual background as it existed at the time the alleged false statements were made. This is so, regardless of the Government's lack of knowledge of all the facts.

In Clayton v. United States, 284 F. 537 (4th Cir. 1922), a Federal Grand Jury was investigating bootlegging. The defendant was convicted of perjury for falsely stating he had not been intoxicated since the enactment of the Prohibition Laws. This Court understandably held that the defendant's intoxication, even if he had admitted it, was irrelevant to the Grand Jury's authorized inquiry. Similarly, here, the appellant's involvement in the Monell case, even if he had been implicated, would not have advanced a proper Federal Grand Jury investigation. See also United States v. Lasater, 403 F.Supp. 208 (W.D. Mo. 1975), where defendant gave false answers to four questions involving certain financial transactions in a tax investigation. The Court found that these allegedly false answers were not material to the Grand Jury's investigation since it did not tend to impede the legitimate progress of their inquiry.

In our case, the Grand Jury had no power to investigate an assault case in the Orange County Court. All the proof

offered by the Government in appellant's trial related solely and exclusively to that case. Since appellant was unlawfully called before that Grand Jury he should have never been required to testify. There is not a shred of responsible legal opinion that supports indicting a person for perjury who has appeared before a Grand Jury whose investigation is impotent.*

In United States v. Koonce, 485 F.2d 374 (8th Cir. 1973), the Court concluded that the Government must prove the materiality of a defendant's statement before the Grand Jury at the time of the indictment.

The Court then went on to state:

> "Essentially, we are left with the allegations of the indictment, unsupported by proof at the trial. '[A] general allegation of materiality is sufficient and it is not necessary to encumber the indictment with, what would amount to be, the Government's argument why it believes the statements were material. The Government, if it wishes to sustain its case, must prove upon the trial of the case, why and how these particular statements were material'" (citing authorities) . . . (485 F.2d at 37).

Here the Government has the duty of proving beyond a reasonable doubt the materiality of the questions the defendant allegedly answered falsely since the materiality was not apparent from the questions themselves. This was never

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*For instance, our Courts have traditionally held that a perjury indictment may not be found for false testimony in response to questions which were not asked for the purpose of eliciting facts material to an investigation. Bowers v. United States, 202 F.2d 447 (D.C. Cir. 1953); United States v. Cross, 170 F.Supp. 303 (D.D.C. 1959).

accomplished.* In this case, the questions and answers alledged to be perjurious, related solely and exclusively to the Monell case. Since there clearly was no jurisdiction to investigate the Monell case, the questions concerning that case were immaterial and the answers could not be perjurious. If the Grand Jury had asked Mr.Doulin, specifically, about gambling cases and he lied, then there may well have been a valid perjury indictment returned. But that is not our case. Consequently, the appellant's conviction must be reversed and the indictment dismissed.

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*Bruno J. Beer, the Deputy Foreman of the Grand Jury testified that the Grand Jury was investigating gambling in the City of Newburgh (908, 910). In particular he stated their interest in learning if "any publicly elected official or city enforcement officers were receiving bribes (911). He stated the Grand Jury indicted Sgt. Billie Lee, a Police Officer, Kay Thorpe, Allen Handler (911). He stated Mr. Doulin was called before the Grand Jury to see if he had some knowledge of the gambling and the bribes in the City of Newburgh regarding gambling (912). On cross examination, the Foreman had to admit that the only information the Grand Jury had received during the time it had sat prior to calling William Doulin before the Grand Jury was that he had - people came to him for favors (914).

Joseph Paul Ciccone, a member of the 1975 additional Grand Jury testified that they were investigating "any corruption or possible corruption of public officials or people some way in the public trust, if they work some way in the public trust" (925). He went on to say that they investigated any "offshoots" of that subject such as tax evasion. More specifically, he stated "We were investigating the possibility that some influence had been used to change a verdict or change a sentence in a case that had occurred in Orange County" (926). . . .

"We were investigating whether any influence was used in the Monell case and in other cases, in any cases whatsoever. - Whenever a question was asked, it was always, 'do you know anything about any influence or any attempt to influence public officials in this case,' and then the next question would be 'or in any other case,' that kind of thing" (942).

Recently, the Supreme Court of the United States, this Court, and other circuits have brought a halt to the alarming trend of overextending federal criminal jurisdiction. United States v. Maze, 414 U.S. 395 (1974); United States v. Bass, 404 U.S. 336 (1971); Rewis v. United States, 401 U.S. 808 (1971); United States v. Tavoularis, 515 F.2d 1070 (2d Cir. 1975); United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974); United States v. Archer, 486 F.2d 670 (2d Cir. 1973).

This Court in Archer lashed out at federal prosecutors who contrived federal jurisdiction in order to herd their victims into federal court, admonishing them against these tactics. In Archer, this Court recognized:

> "There is no evidence that, at the time of the February 1972 meeting, the federal law enforcement officers had any information that the supposed corruption of the Queens County District Attorney's office involved violations of the Travel Act, 18 U.S.C. §1952; the hope was rather that if the playing of the Bario-Murano scenario would induce corrupt activity, some interstate or foreign element might occur or, if not, might be injected. Today there is widespread concern whether the federal criminal law has not outrun reasonable bounds . . . " (486 F.2d at 677).

In dealing with the Archer case, this Court noted:

> "Although §207 of the Commission's Proposed Code, entitled "Discretionary Restraints on Exercise of Concurrent Jurisdiction," includes among the cases where 'a substantial federal interest exists' . . . it is not clear that this comprehends the case where federal investigators have no reason to suspect any violation of federal law. Even if the proposed code section was intended to cover such cases, we are not sure we would agree that the federal interest should extend that far" (486 F.2d at 678).

Significantly, this Court stressed in Archer:

> "While responsibility for keeping federal criminal investigations and prosecutions within the bounds appropriate on the assumptions inherent in a federal system should rest, in the first instance, with United States Attorneys . . . , we are not prepared to say that, absent Congressional limitation, a federal court may never dismiss a prosecution as an abuse of federal power . . . " (Id.).

Although in Archer this Court reversed on other grounds, this language bears directly on the case at bar. The Court did stress after carefully cataloging all the recent decisions where federal jurisdiction was based on flimsy grounds to say the least:

> "Manufactured federal jurisdiction is even more offensive in criminal than in civil proceedings (citing authority). [It] 'is a reflection on the federal judicial system and brings it into disrepute'" (486 F.2d at 682).

Accordingly, the Court concluded that the telephone calls utilized in Archer were "insufficient to transform this sordid, federally provoked incident of local corruption into a crime against the United States" (486 F.2d at 683).

Despite this Court's carefully designed warning, Judge Friendly's melancholy forecast has all too soon been fulfilled. This case, more than any other, confirms our worst suspicions of how federal jurisdiction can be grossly overextended and the powers of Federal Grand Juries grievously abused.*

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*Even Judge Ward expressed his misgivings about any Federal jurisdiction in this case when he stated to the U.S. Attorney:

> "Should not this matter have been turned over to a state prosecutor to prosecute in the state courts where the judicial system had been undercut and subverted." (1023).
>
> . . .
>
> "I don't remember anything about a dispute over a gambling operation, proceeds or anything like that. His activities were, in the first instance, removed from gambling" (1024).

Judge Ward did, however, conclude that there appeared to be an investigation of the income tax laws, and thus sustained the indictment.

United States v. Tavoularis, 515 F.2d 1070 (2d Cir. 1975), came in the wake of Archer. And again this Court had to reprimand prosecutors by stating:

> "The prosecutorial branch of the law enforcement establishment is quite properly vested with considerable discretion in deciding what charges to bring against whom, but in this case the improvident exercise of this discretion - not only in selecting the particular statute under which the case proceeded, but also, and more fundamentally, in pursuing this matter in federal court rather than turning it over to state authorities for prosecution in a more appropriate forum - has caused the release of three proven criminals who ought to be in prison.. . . The blame for this unhappy but necessary result must be placed squarely on the shoulders of the Strike Force attorneys in charge of this case" (515 F.2d at 1077-78).

Time has taught us that the only way to effectively cope with prosecutorial delinquency is to disable prosecutions resulting from illegal practices.* The misdeeds of prosecutors, or for that matter, grand juries are singularly discouraged by making their misadventures

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*Counsel complained about the mistreatment of the defendant before the grand jury and moved to dismiss the indictment on these grounds (1018). The Court rejected that complaint (1027).

unprofitable. When evidence is seized illegally, confessions coerced, and unlawful identification procedures used, that tainted proof is judicially suppressed. Certainly that well-established legal doctrine should apply here. Recently, this Court, in United States v. Jacobs, Docket No. 75-1319, (2d Cir., Feb. 24, 1976), approved the suppression of evidence before a grand jury because a witness was not advised that she was the target of the investigation. In Jacobs, this Court decided that the dismissal of a perjury count in the indictment was appropriate.*

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* The Court stated:

> "Since the suppression of the grand jury testimony wipes out the entire predicate for the perjury count in this case, Judge Neaher also properly dismissed Count 2 (the perjury count) of the indictment before trial" (Slip Op. at 2118 n.7).

The Court went on to state:

> "Nor do we deal with perjury committed by a prospective defendant after adequate warning of his status. We are satisfied that we should affirm in this case solely under our supervisory powers" (Slip Op. at 2118).

Although William Doulin was advised that he was "one of the people who are under investigation" (GX 24 at p. 5), he was without counsel.

Certainly, under all the circumstances of this case, and in keeping with the spirit of Jacobs, the Government had a duty to advise the appellant of the conflict in testimony before the grand jury and apprise him of his right to recant under Section 1623. Fundamentally, the purpose of having witnesses testify before a grand jury is to discover the truth, not to inveigle them into committing perjury. Recently, the 3rd Circuit in United States v. Lardieri, 497 F.2d 317 (3rd Cir. 1974), dealt, in the most humane fashion, with this issue. There a witness was called before a grand jury without counsel, and was advised of the provisions of Section 1623, but not the recantation section. The 3rd Circuit observed that the recantation provision of Section 1623 had the following purpose:

> "That this was to encourage disclosure by utilizing a combination of the carrot and stick approach is clear from the legislative history. 'It serves as an inducement to the witness to give truthful testimony by permitting him voluntarily to correct a false statement without incurring the risk [of] prosecution by doing so.' 2 U.S. Code Cong. & Adm. News p. 4024 (1970)" (497 F.2d at 321).

The Court went on to stress:

> "If the recantation provision is to serve its purpose, it would seem to follow that in some circumstances there may be a requirement that the witness know of its existence.
>
> "Although there is no duty generally on the part of the government to explain a grand jury witness's right to him, United States v. DiMichele, 375 F.2d 959 (3d Cir. 1967), this would not necessarily cover the situation where a government attorney chooses to enlighten the witness on the punitive provisions of a false swearing statute when the witness has no knowledge of the recantation provisions" (Id.).

The Third Circuit remanded the case to the District Court for a hearing to determine whether the indictment should be dismissed because of this prosecutorial failure.

In our case, the defendant appeared before the grand jury without counsel and consequently, it may be assumed, has absolutely no knowledge of his right

to recant. On the other hand, the U.S. Attorney knew full well that the scene was being set for a perjury indictment. The record leads inescapably to that conclusion. Under the narrow circumstances of this case, would it not be fairer and more decent to advise an unrepresented witness before the grand jury of the conflict in testimony and suggest to him the option he has of correcting his testimony. Otherwise, he risks indictment. We recognize that in United States v. Camporeale, 515 F.2d 184 (2d Cir. 1975), this Court held that the Government had no duty to warn a witness of his right to recant. See also United States v. Del Toro, 513 F.2d 656, 666 (2d Cir. 1975); United States v. Cuevas, 510 F.2d 848, 851 (2d Cir. 1975). However, in each of those cases our investigation shows that the witnesses before the grand jury were represented by counsel, and had presumably been advised of their right to recant. Furthermore, this Court stressed in Camporeale:

> "In any event the prosecutor in the present case acted fairly, advising Camporeale at the outset of his grand jury testimony that his 'activities had been under surveillance for a considerable period of time" (515 F.2d at 189*).

*The judgment of conviction in Camporeale was reversed on other grounds.

In our case there was not the slightest hint that any other witnesses had testified differently before the grand jury.

It only remains to be said that today the grand jury's historic function of keeping citizens secure from public accusation of crime before probable cause is established seems to have been perverted. Today, the Government's misuse of grand juries to make men, against whom the Government has no evidence of wrongdoing, either commit perjury or contempt has dishonored its constitutional purpose. There are many who fear that grand juries have become instruments of persecution, rather than prosecution.

This unseemly misuse of official power is responsible for a sad catalogue of cases developed throughout this country which have become a disappointing testament to our judicial system's failure to limit the overreaching of grand juries which have become masters rather than servants of the law. We are proud to acknowledge that recently our courts have bravely ventured down the mean streets of grand jury malpractices and have been appalled by what was seen. A new testament is now being written, bringing to a stop these subversive grand jury practices. *

*This Circuit has halted the misleading use of hearsay before grand juries in United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972); it has also foreclosed grand juries from acting beyond the end of its 18-month statutory life, United States v. Fein, 504 F.2d 1170 (2d Cir. 1974); McClure v. County Court of the County of Dutchess, 41 A.D.2d 148, 341 N.Y.S.2d 855 (2d Dept. 1973); as pointed out earlier it has cracked down on the failure to advise a target of a grand jury investigation of her status. United States v. Jacobs, F.2d (2d Cir. 1976). Other Courts have required the legal instructions given to grand juries to be recorded, People v. Percy, 45 A.D.2d 284, 285, 358 N.Y.S.2d 434 (2d Dept 1974), aff'd, N.Y.2d , N.Y.S.2d (Jan. , 1976). New York courts have now insisted that legal instructions furnished grand juries must be accurate, People v. Mackey, 371 N.Y.S.2d 559 (Suffolk County Ct. 1975); People v. Ferrara, 370 N.Y.S.2d 356 (Nassau County Ct. 1975); People v. Lawson, 374 N.Y.S.2d 270 (Sup.Ct. 1975). The California Supreme Court has held that a prosecutor has a duty to inform a grand jury about exculpatory evidence, Johnson v. Superior Court, 18 Crim.L.Rptr. 2054 (Sept. 19, 1975). The abuse of grand jury process is being stopped, United States v. Dardi, 330 F.2d 316 (2d Cir. 1964); United States v. Fisher, 455 F.2d 1101 (2d Cir. 1972); In re grand jury subpoena of Stolar, 397 F.Supp. 520 (S.D.N.Y. 1975). Prosecutorial misconduct before grand juries is being halted, United States v. Mandujano, 496 F.2d 1050 (5th Cir. 1974); as is knowingly presenting perjured testimony before a grand jury, United States v. Basurto, 497 F.2d 781 (9th Cir. 1974); see also Frankel and Naftalis, Grand Jury - An Institution on Trial, THE NEW LEADER, November 10, 1975, Vol. LVIII, No. 22; The New York State Investigation Commission conducted hearings in New York City and Buffalo, New York, in January of 1976 concerning grand jury leaks.

The relief we seek here is compatible with this overall philosophy and advances its general objectives.

Our courts must stand up to prosecutors and their misguided grand juries so that we are assured that the Grand Jury system of this country is restored to its original status in our hierarchy of constitutional values. What was done to the appellant here offers an ominous omen of what will come if some legal limits are not placed on these prosecution tactics. For despite the well-considered warnings of this Court, which have echoed throughout two decades, it is apparent that prosecutors are determined to use the Grand Jury to their advantage, as shown by the sad list of cases reluctantly tolerated by this Court.

If there is a danger from those in public office who have behaved badly, there is even a greater threat from the law-abiding who, in excess of anxiety, may jettison liberty for the sake of safety. Public devotion to our Government comes from the love of a good and honest legal system, not from the fear of a bad one. Society is the ultimate loser when, in order to convict those suspected of

crime, public officials use methods that lead to an increased disrespect of our judicial system. See Jacobs, supra; Toscanino, supra; Archer, supra.

If the Court gives into the Government here, there will be no end to unauthorized extension of Federal jurisdiction and the misuse of the Grand Jury process.* Let the word go out from this Court to the four corners of this Circuit that some limits must be placed upon Grand Jury investigations, and that this form of prosecutorial misconduct will not be tolerated.

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*The Court may recall the prophetic exchange between the Queen and Alice in Through the Looking Glass by Lewis Carroll.

"The Queen: There is the King's messenger. He is in prison now, being punished and the trial doesn't even begin until next Wednesday; and of course the crime comes last of all.

Alice: Suppose he never commits the crime?

The Queen: That would be all the better, wouldn't it"?

Lewis Carroll, Through the Looking Glass, (World Publishing Co., 1946) at 226.

POINT II

THE TRIAL COURT'S DETERMINATION THAT THE ALLEGED PERJURIOUS ANSWERS WERE MATERIAL, AS A MATTER OF LAW, DENIED THE APPELLANT HIS SIXTH AMENDMENT RIGHT TO A JURY TRIAL ON THIS ESSENTIAL ELEMENT OF THE CRIME OF PERJURY.

There is presented by this appeal a question, unemcumbered by any factual disputes, which reaches constitutional proportions. That question may be simply stated:

> "Where the element of 'materiality' is an essential element of the crime of perjury, requiring factual proof, may that issue be taken from the jury and resolved by the trial judge alone"?

The trial judge instructed the jury that "the matters about which Mr. Doulin testified as set forth in the indictment were material to the issues under

inquiry by each grand jury before whom testimony was given " (1347).* Counsel seasonably excepted to the Court's charge removing the issue of materiality from the jury's consideration (1365).

Section 1623 of Title 18 only makes criminal "any false material declaration . . ." made before a Grand Jury. Thus, materiality is an essential element of the crime of false

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*The Court stressed in the charge:

> "The issue of materiality is for the Court to determine and is not a question of fact for the jury. Therefore, you need not concern yourselves with the first and fourth elements that I have just outlined to you. You must direct your attention to the second and third elements " (1348).

Earlier the Court defined the essential elements of perjury as follows:

> "1. That the defendant took an oath to testify truthfully to the grand jury;
>
> 2. that the defendant made false statements as to matters about which he testified under oath as set forth in the indictment;
>
> 3. that such false statements were wilfully made in that at the time the defendant made these statements to the Grand Jury he knew them to be false;
>
> 4. that the matters as to which it is charged he made false statements were material to the issues under inquiry by the jury " (1346).

declarations before Grand Jury or Court. Prosecution witnesses Bruno J. Beer, the Deputy Foreman of the 1972 Grand Jury, and Joseph Ciccone, a member of the 1975 Grand Jury, both testified extensively on the issue of materiality (907-949).

The right to a jury trial in a criminal case, guaranteed by the Sixth Amendment, includes receiving the jury's judgment on every essential element of the crime charged. During the last decade the United States Supreme Court has re-emphasized the importance of a defendant's right to a jury trial. Baldwin v. New York, 399 U.S. 66 (1971); Duncan v. Louisiana, 391 U.S. 145 (1968)*;

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*In Duncan, the Supreme Court wisely observed:

> "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power -- a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence" (391 U.S. at 156).

Bloom v. Illinois, 391 U.S. 194 (1968).

There is no legal or logical excuse for excluding the crucial question of materiality in a perjury case from the collective judgment of 12 jurors. The evidence on this vital issue supplied by two witnesses needed a jury's evaluation just as much as any other factual issue. To allow a judge to preempt the fact-finding process on this important question was unconstitutional. Here the proof of materiality was most fragile, to say the least, and virtually nonexistent, to say the most. A jury, after assessing the questionable testimony of Mr. Beer and Mr. Ciccone may well have found the appellant not guilty.

Our most basic criminal disciplines teach us that in any criminal proceeding, and in almost all civil cases, the defendant has the unqualified right to have each essential element of the crime judged by a jury. In the case at bar, the trial judge, in effect, directed a verdict of guilty on the issue of materiality. For even if the jury decides that the answers are false, a defendant cannot be convicted under Section 1623 unless those statements are material to a proper Grand Jury inquiry. Surely, under the compelling language quoted in Duncan, the appellant was entitled to have this

important issue studied by the aggregate reasoning powers of 12 jurors. The value of a jury verdict lies in the acknowledgement that by multiplying judgments we usually reduce the margin of error in our decision-making process. The trial court's unfortunate departure from this constitutionally mandated requirement of a jury trial, enshrined in the Sixth Amendment, necessitates a reversal of the appellant's conviction.

There can be no question that materiality is an essential element of the offense of perjury. United States v. Stone, 429 F.2d 138, 140 (2d Cir. 1970). In this case, materiality was a seriously contested factual question and the credibility of the witnesses who testified in support of this criminal element was vigorously attacked. These prominent features compelled the use of a jury's rationale under the Sixth Amendment.

We are unable to understand how the factual determination of materiality is any different from the complex questions juries are authorized to decide in cases involving mail fraud; anti-trust prosecution; SEC violations; conspiracy offenses; or the serious factual decisions made by them in obscenity prosecution involving prurient appeal; contemporary community standards; and redeeming social value.

It is well settled that a Court may not withdraw from a jury's consideration any essential element of a criminal offense. Horning v. District of Columbia, 254 U.S. 135 (1920); Sparf v. United States, 156 U.S. 51 (1895); Byrd v. United States, 342 F.2d 939 (D.C. Cir. 1965); Jackson v. United States, 348 F.2d 772 (D.C. Cir. 1965). A court has no authority to direct a verdict of guilty. United Brotherhood of Carpenters and Joiners of America v. United States, 330 U.S. 395 (1947). The Fifth Circuit in Mims v. United States, 375 F.2d 135 (5th Cir. 1967), stated:

> "An instruction deciding a material fact issue as a matter of law adversely to the accused is regarded as a partial instructed verdict of guilty prohibited by the rule just stated" (375 F.2d at 148).

See also United States v. McKenzie, 301 F.2d 880 (6th Cir. 1962); Roe v. United States, 287 F.2d 435 (5th Cir. 1961); Brooks v. United States, 240 F.2d 905 (5th Cir. 1957); United States v. Manuszak, 234 F.2d 421 (3d Cir. 1956).

In United States v. Lee, 483 F.2d 959 (5th Cir. 1973), the Court reversed appellant's judgment of conviction because:

> "[T]he district court refused to instruct the jury that it was to determine whether the perfume in fact arrived in Miami on flight 918. Instead of instructing on this material issue of fact, the court's jury instructions impliedly assumed its existence" (483 F.2d at 960).

This Court's recent decision in United States v. Singleton, Docket Nos. 75-1114, 75-1209, 75-1210 (2d Cir., Feb. 13, 1976), is most relevant. There the trial judge indicated to the jury that the issue concerning whether certain checks were stolen was uncontested. This Court concluded that such a statement constituted a partially directed verdict which was constitutionally impermissible. The Court declared:

> "Such a 'directed verdict' on any issue in a criminal case is, of course, an unjustifiable encroachment upon the jury's sole duty, i.e., to decide an issue of fact."

This Court emphasized that even an undisputed fact cannot be removed from the jury's consideration either by direction or omission in a trial court's charge. See also United States v. Natale, Docket No. 75-1276 (2d Cir., Nov. 28, 1975); United States v. Hines, 256 F.2d 561 (2d Cir. 1958). Here the element of materiality is an essential, substantive element of the crime of making a false material declaration before a Grand Jury.* Accordingly, it was simply wrong for the trial judge to direct a verdict on this crucial aspect of the offense.

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* Certainly, at the very least, the materiality issue in this case was a mixed question of law and fact which should have been submitted to the jury under appropriate instructions. Luse v. United States, 49 F.2d 241 (9th Cir. 1931).

New York State holds that the matter of materiality in a perjury prosecution must be submitted to the jury. People v. Clemente, 285 App.Div. 258, 136 N.Y.S.2d 202 (1st Dept. 1954), aff'd, 309 N.Y. 890 (1955).

The concept of materiality being resolved by a judge has its origin in Sinclair v. United States, 279 U.S. 263 (1929). In Sinclair the issue involves whether questions asked of a witness before a Congressional committee were "pertinent" to the subject of the inquiry. The Court determined that:

> "The question of pertinency under section 102 was rightly decided by the court as one of law. It did not depend upon the probative value of evidence. That question may be likened to those concerning relevancy at the trial of issues in court, and it is not essentially different from the question as to materiality of false testimony charged as perjury in prosecutions for that crime" (279 U.S. at 298; emphasis supplied).

However, Sinclair was convicted of contempt, and not perjury. The circumstances of Sinclair are distinct from those presented here.

We recognize the ambitious nature of this undertaking in view of the Sinclair case and this Court's decision in United States v. Mancuso, 485 F.2d 275 (2d Cir. 1973). But

Sinclair was decided almost 50 years ago and deserves re-examination. The steady devotion to this grizzled authority by Circuit Courts is dutiful, but not necessarily commendable. Since 1929 this rule has been taken for granted and merely re-stated by Circuit Courts without reason.

In a rapidly changing culture, precedent becomes less relevant. Every judgment in the law, particularly those of long standing, exist on the edge of error and must be constantly reviewed. Democratic institutions must maintain their ability to change and make more meaningful constitutional imperatives. A judicial system that has abolished the systematic exclusion of minority groups from Grand Juries, bench trials, alibi disclosure statutes, and has struck down a host of other rules, previously tolerated, because they have become incompatible with fundamental constitutional principles, can well afford to relegate this archaic rule to a legal museum.*

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* Taylor v. Louisiana, U.S. , 95 S.Ct. 692 (1975); Duncan v. Louisiana, supra; Wardius v. Oregon, 412 U.S. 470 (1973); Bruton v. United States, 391 U.S. 123 (1968).

The perpetuation of court-determined materiality can no longer be reconciled with a modern day defendant's right to have his guilt or innocence adjudicated by 12 members of his community. The relentless invoking of this outmoded precedent does little to assure the public that the judicial branch of our government is adjusting to changing times. Thus, this Court should bravely overrule this antiquated principle and reverse the appellant's conviction.

POINT III

THE UNLAWFUL ADMISSION OF PREJUDICIAL HEARSAY EVIDENCE DENIED THE APPELLANT THE RIGHT OF CONFRONTATION GUARANTEED BY THE SIXTH AMENDMENT.

Appellant's trial was plagued with a critical error which allowed an enormous amount of hearsay evidence into the lawsuit. Although much of this hearsay evidence was received subject to connection, and over appellant's objection, eventually the Court submitted all this dubious proof to the jury (306, 1009). The receipt of this devastating hearsay evidence requires that appellant's judgment of conviction be reversed.

We have tried to corral the most damaging species of this hearsay evidence in the space limitations of an appellate brief. However, there is no way we can convey the anguishing impact this live and hazardous evidence had upon the jury. Listed below are the witnesses who furnished the most precarious hearsay evidence, and the substance of that proof:

Florence Hall

Florence Hall, Richard Monell's girlfriend, was allowed to state to the jury that Mrs. Grant (Richard Monell's grandmother) made the following statement: Prior to Monell's

sentencing she said, "not to worry about it, that it would all be taken care of and he'd be home" (367, 368); when Richard went to jail, Florence Hall testified that Mrs. Grant said she was going to get in touch with Mr. Doulin (369).

On another occasion Miss Hall testified that Mrs. Grant said that she had spoken to Mr. Doulin and he told her that he needed some money (381); Hall testified that Mrs. Grant and she "gave the money to Mr. Doulin" (383) /and/ ". . . that's all the money that I have left. Richard better keep himself out of trouble now or he'll stay in jail" (384).

Miss Hall also testified that Mrs. Grant said when Richard was in Family Court jail that she would call "Bill" to see if something could be done about getting him out (361); after Monell was released Miss Hall said Mrs. Grant said "See I told you that I would get you out" (364).

Richard Monell

Richard Monell was allowed to testify that Florence Hall told him that Mrs. Grant told her she was having trouble getting ahold of Mr. Doulin in Florida (314); he stated that after he got out of jail his grandmother said she was going down to see "Bill" (320); and that he should keep up his Family Court payments or he would be letting "our friend" down (322).

Norman Shapiro

Norman Shapiro, the Legal Aid attorney who represented Monell at the time he was sentenced, was permitted to testify that he received a telephone call from Mrs. Grant and she said that the sentence was "bought and paid for" (745).

Mrs. Grant denied contacting William Doulin to have her grandson's sentence altered (631). She forthrightly stated that she never paid any money to anyone to get Richard Monell out of jail (618, 629). She denied ever telling anyone that Richard Monell would receive probation (628).

Thus the jury was allowed to consider two sources of evidence -- that given by witnesses who stated what Mrs. Grant was alleged to have said -- and the sworn testimony of Mrs. Grant, who denied ever making those statements. However, all the hearsay evidence was given to the jury for the truth of the matter asserted prior to Mrs. Grant's denial of those statements. Consequently, the jury had branded into their memories this unreliable hearsay evidence before it ever heard Mrs. Grant's repudiation of it.

Most of this questionable hearsay evidence was offered on the tenuous theory that Mrs. Grant was the appellant's co-conspirator (157). Although the Court expressed great misgivings about that theory (157), eventually the Court allowed all the evidence to stand (1009). Under the well-formulated rules of this Court, no conspiracy was ever established between Mrs. Grant and William Doulin.*

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* This rule was well expressed in Carbo v. United States, 314 F.2d 718 (9th Cir. 1963), where the Court said:

> "It is well established that the declarations of one conspirator in furtherance of the objects of the conspiracy, made to a third party, are admissible against his co-conspirators.
>
> "It is also well established, however, that such declarations are admissible, over the objection of a co-conspirator who was not present when they were made, only if there is proof independent of the declaration that he is connected with the conspiracy (citing authority). 'Otherwise, hearsay would lift itself up by its own bootstraps to the level of competent evidence'" (314 F.2d at 735).

United States v. Alsondo, 486 F.2d 1339 (2d Cir. 1973); United States v. Richardson, 477 F.2d 1280 (8th Cir. 1973); United States v. Geaney, 417 F.2d 1116 (2d Cir. 1969). The Government also contended that Florence Hall was a part of this conspiracy, although the indictment contained no such allegation and no proof of that was submitted during the trial.

There is no question that this class of evidence was clearly hearsay and did not come within reach of any of the Federal Rules of Evidence. As we have shown, this contaminated proof could not come into this case through the conspiracy proscenium since that relationship was never established.

Recently this Court held in United States v. Kaplan, 510 F.2d 606 (2d Cir. 1974), that disputed hearsay evidence improperly received in the defendant's trial required a reversal of his conviction. And in United States v. Pacelli, 491 F.2d 1108 (2d Cir. 1974), again the Court reversed a judgment of conviction because the extra judicial statements relating to defendant's criminal liability should have been excluded from the trial.

In United States v. Birnbaum, 337 F.2d 490 (2d Cir. 1964) a prosecution witness was allowed to testify that he was told the defendant had "declared himself a partner in the deal . . . and kept most of the money." This Court

reversed appellant's bribery conviction because of the unlawful receipt of this damaging hearsay.

When Mrs. Grant was called to the witness stand by the prosecution and denied that all of these conversations took place, defense counsel was foreclosed from impeaching the hearsay statements attributed to her by Florence Hall, Richard Monell and the other witnesses. He could not go beyond their testimony and demonstrate that what they said Mrs. Grant said, was untrue. Thus appellant was denied his right of confrontation because of Mrs. Grant's denial that the hearsay statements were ever made. Douglas v. Alabama, 380 U.S. 415 (1965).

In Townsend v. Henderson, 405 F.2d 324 (6th Cir. 1968), the Court reversed the appellant's conviction because hearsay evidence was introduced against a defendant through a co-defendant's confession. However, in the trial, the confessing co-defendant took the stand and denied the confession. The Sixth Circuit, in a well reasoned opinion, held:

> "[A]lthough Terry was called as a witness, he denied making the confession. Townsend therefore had no effective right of cross-examination in regard to the confession" (405 F.2d at 329). See also West v. Henderson, 409 F.2d 95 (6th Cir. 1969).

The devastating nature of this hearsay testimony is confirmed by the jury's finding the appellant guilty on Counts 2, 5, 6 and 7 dealing with the very subject of the hearsay testimony. There was absolutely no other proof supporting these charges except that which came through the hearsay evidence.

It only remains to be said that it is most unfortunate that prosecutors continue to exploit this unlawful form of evidence, ignoring this Court's repeated warnings against such practices. And so, once again, the Government has succeeded in contaminating the defendant with the most unreliable form of evidence, but against which he could not innoculate himself. When the trial court refused all attempts to quarantine him from this epidemic of illegal proof by appropriately instructing the jury, the skill of no lawyer could save him, and all hope of a just verdict became forlorn. For all these reasons, the appellant's judgement of conviction should be reversed.

POINT IV

THE COUNTS 2, 5, 6 AND 7 OF THE INDICTMENT ARE MULTIPLICITOUS.

This appeal highlights a critical question concerning the propriety of a perjury indictment. Under Counts 2, 5, 6 and 7 of the indictment, the appellant was asked essentially the same question in different ways. We have summarized these counts as follows:

Count Two

Q. . . . I ask you if there ever came a time when anyone had approached you to ask you to exert some influence or had offered you any money to try to exert influence in connection with the gambling laws?

A. Nobody offered me money . . . . I've never yet approached a D.A., an Assistant or any judge or anyone.

Q. For any purpose?

A. For anything.

Count Five

Q. Have you directly and personally or indirectly, through someone else, interceded in any case in the criminal justice system in an attempt to influence the outcome of the case or investigation or the trial or whatever was pending?

A. Never.

Count Six

Q. Did Mrs. Grant at any time ever have a discussion with you in which you agreed to intercede on behalf of her grandson, Richard Monell, (or did you ever have conversations with anyone) in which they asked you to intercede in Richard Monell's criminal case and to use your influence to assist Richard Monell?

A. No.

Q. Did you ever offer or volunteer to intercede on Mr. Monell's behalf in his criminal case?

A. No.

Count Seven

Q. Did you ever have a discussion with anyone in which he discussed interceding in Richard Monell's criminal case in order to assist Richard Monell and to use your influence to help him?

A. No.

Clearly, Counts 2, 5, 6 and 7 ask essentially the same question -- Did anyone ever approach you, or did you ever have a discussion with anyone, on the subject of exerting influence concerning a criminal case, and particularly, the Monell case? There are other minor variables present in each of the individual counts, but these nuances do not alter

the dominant theme of the single inquiry. These questions, no matter how phrased, sought to simply discover whether William Doulin interceded or discussed interceding in the Monell case or any other case. Accordingly, if his denial was untrue (which we do not for a moment concede), there was only a single act of perjury committed.

The vice of multiplicity is the charging of a single crime in multiple counts. Appellant's indictment is clearly multiplicitious and involves a misjoinder of counts in violation of Rule 14 of the Federal Rules of Criminal Procedure. The virtue of this rule is that it lessens the probability of double punishment and the obloquy of multiple charges for the same alleged misconduct. North Carolina v. Pearce, 395 U.S. 711 (1969)

Counsel complained in advance of and during the trial about the misjoinder of these charges, contending that the defendant could not be convicted under each of these counts but, if liable at all, was responsible for only a single episode (1016). Thus, it was a cardinal error, reaching due process proportions, for the trial court to compel the appellant to proceed to trial under these fragmented charges. The appellant was prejudiced in that the duplication of

charges always magnifies his criminal liability in the eyes of the jury. Even though William Doulin received concurrent sentences, the conviction on four counts must have influenced the Court, resulting in the imposition of a more severe sentence.

The legal realm of multiplicity is sparsely populated with legal authorities. For instance, this Court has charted a course across virtually every province of the criminal law and yet it has not spoken on the subject of multiplicity.* A sustained judicial neutrality on this crucial issue is bound to sponsor further abuse. This case, more than any other, offers the Court an excellent opportunity for taking corrective action.

The test applied by our courts to determine the number of separate criminal offenses that can be carved out of a single transaction is whether the same evidence is required to sustain each charge. If not, then the fact that a number of charges relate to and grow out of one transaction does not

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* In United States v. Dixon, Docket No. 75-1317 (2d Cir., March 12, 1976), this Court was on the verge of finding the duplication of SEC charges in mail fraud counts as multiplicitous but avoided that determination by dismissing the mail fraud counts because of insufficient proof.

make a single offense where two are defined by statute. Bell v. United States, 349 U.S. 81 (1955); In re Snow, 120 U.S. 274 (1887).

Prosecutors should not be allowed to scramble or garble their questions in such a fashion so as to proliferate perjury charges, as demonstrated in this case. In 1970, the Ninth Circuit came directly to grips with this issue in Gebhard v. United States, 422 F.2d 281 (9th Cir. 1970), dealing with the famous Friar's Club fraud in Los Angeles. There the Court, in a locomotive opinion, that cuts straight through the ambiguities of multiplicity, stressed in unmistakable language:

> "On the other hand, we do not think it proper that the government bludgeon a witness who is lying by repeating and rephrasing the same question, thus creating more possible perjury counts" (422 F.2d at 289-90).

After illustrating the counts it found to be multiplicitious, the Court decreed:

> "We are of the opinion that only one count in each of these groups should be allowed to stand. Otherwise a prosecutor could run up a possible perjury sentence indefinitely merely by repeating the same question. Single punishment for a single lie should suffice" (422 F.2d at 290).

The Sixth and Eighth Circuits have come to the same conclusion, holding that the offense of perjury may not be compounded by the repetitious asking of the same question. United States v. Lazaros, 480 F.2d 174 (6th Cir. 1973); Masinia v. United States, 296 F.2d 871 (8th Cir. 1961).

The major reason that the prosecution should be required to make a selection among multiplicitious counts is to promote an efficient trial and avoid the risk that a "prolix pleading may have some psychological effect upon a jury by suggesting to it that defendant has committed not one but several crimes." United States v. Mamber, 127 F. Supp. 925, 927 (D. Mass. 1955)

Our case fits well within these authorities. For the evidence needed to convict under each of these counts was identical. The whole case against the appellant dealt with the alleged influence exercised in the Monell case. No other evidence of any kind was introduced.

Accordingly, appellant has met the test dealing with multiplicity and is entitled to a reversal.*

The trial court's failure to dismiss the superfluous counts of this indictment gravely prejudiced the appellant and must have influenced the court when it imposed sentence, authorizing a reversal of appellant's conviction. United States v. Mancuso, 485 F.2d 275 (2d Cir. 1973) Surely, the policy served by the rule against multiplicity would be better promoted if this Court struck down such defective indictments. Otherwise, the doctrine against multiplicity will become a myth. For all these reasons, the appellant's judgment of conviction should be reversed and a new trial should be granted.

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* Although admittedly there is less anxiety and ordeal when the blows of criminal accusation are delivered at once, one can hardly say that one is not unduly punished, hurt or embarrassed when a defendant receives several convictions. The collateral effects of a conviction, independent of the sentence, are many and varied. See Note, Collateral Consequences of a Criminal Conviction, 23 Va.L.Rev. 929 (1970); Note, Civil Disability of Felons, 53 VA.L. Rev. 403 (1967); Sibron v. New York, 392 U.S. 40 (1968). Nor are the harmful consequences erradicated by the vacation of other sentences. For several states permit the use, for purposes of credibility of a witness, of a verdict of guilty upon which no judgment has been entered or sentence passed. See, Annot., 14 A.L.R. 3d 1272 (1967). Moreover, even if no other disability were incurred, there is always an extra stigma imposed upon one's reputation.

POINT V

TRIAL ERRORS DENIED THE APPELLANT A FAIR TRIAL.

Under Bronston v. United States, 409 U.S. 352 (1973) the Supreme Court concluded that if the questions asked, leading to the allegedly perjurious answer, are not specific or if multiple interpretations can be drawn from the questions, there can be no perjury. See also United States v. Cook, 489 F.2d 286 (9th Cir. 1973); United States v. Wall, 371 F.2d 398 (6th Cir. 1967); United States v. Esposito, 358 F.Supp. 1032 (N.D.Ill. 1973); United States v. Cobert, 227 F.Supp. 915 (S.D.Cal. 1964); United States v. Lattimore, 127 F.Supp. 405 (D.D.C. 1955).

In Bronston the Court declared:

> "Whether an answer is true must be determined with reference to the question it purports to answer, not in isolation. An unresponsive answer is unique in this respect because its unresponsiveness by definition prevents its truthfulness from being tested in the context of the question -- unless there is to be speculation as to what the unresponsive answer 'implies' " (409 U.S. 355 n. 3).

The Supreme Court then went on to stress:

> "The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry (citing authority)" (409 U.S. at 360).

An inspection of the indictment annexed to this brief as an appendix demonstrates the confusing nature of the questions asked of the appellant. At one point in the trial it took court and counsel, in an extended colloquy, covering six pages of the trial transcript, to ferret out and speculate about the meanings of the questions and answers. Phrases such as "for any purpose," "influence," "subject matter" or "anything" are entirely too vague and ambiguous to form the foundation for a perjury prosecution. Thus the appellant's conviction should be reversed and a new trial should be granted.

Clearly, where a defendant is charged with perjury in the denial of several conjoined statements, the law provides if any one of those statements were untrue, his answer to the conjunctive question would be true. Thus, the appellant is not guilty of perjury here because the evidence shows that at least one of the conjunctive questions in each of the counts was untrue. Luse v. United States, 49 F.2d 241 (9th Cir. 1931).

There are two other nagging questions in this case that must be discussed with the Court. Counsel requested that the court instruct the jury regarding its interpretation of any of the questions asked of the appellant be judged in context with the other questions asked and answered (1401, 1402, 1418). He suggested that the court explain to the jury that they have a right to have any of the questions and answers re-read to them. For some unexplainable reason, the court declined to give this instruction (1419). This failure achieved inordinate importance in light of the jury's expressed inability to understand count 2 of the indictment (1389). The court is obliged to reinstruct the jury on any question that appears to present confusion. Bollenbach v. United States, 326 U.S. 607 (1946). The court's failure to fulfill this obligation requires the reversal of the judgment of conviction.

It was also reversible error for the Government to attempt to prove through a court stenographer of Orange County that he received his appointment under the auspices of the appellant (244). Although the trial court expressed

great misgivings about the relevancy of this proof, it overruled defense counsel's objections (245, 248). The Government claimed this proof was relevant to prove "the power and position of Mr. Doulin" (246). This regrettable effort by the Government in an "over-kill" prosecution requires that the appellant's judgment of conviction be reversed.

Conclusion

For all these reasons, the appellant's judgment of conviction should be reversed and the indictment should be dismissed, or in the alternative, a new trial should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
	:	
-v-	:	INDICTMENT
	:	
WILLIAM E. DOULIN,	:	75 Cr. 630
	:	
Defendant.	:	

INTRODUCTION

The Grand Jury charges:

1. At all times relevant to this indictment WILLIAM E. DOULIN was the Chairman of the Orange County Republican Committee, Orange County, New York.

2. At all times relevant to this indictment Abraham J. Weissman was an Assistant District Attorney or the District Attorney of Orange County, New York.

3. On or about September 3, 1968 Richard Monell of High Falls, New York was indicted by the Orange County Grand Jury and charged in the Indictment Number 88-68, People of the State of New York against Richard Monell with violations of New York State laws,

that is, the crimes of assault in the first degree and assault in the second degree, in connection with an alleged assault he had committed upon George DeWeaver on or about April 21, 1968. On December 14, 1970, Richard Monell entered a plea of guilty in the County Court of the State of New York, County of Orange to a charge of attempted assault in the second degree in satisfaction of those charges. On March 5, 1971 Richard Monell was sentenced. Counsel for the defendant and then Acting District Attorney Jerome Cohen were heard by the Court. Mr. Cohen made no recommendation as to sentence. Thereafter Monell was remanded to the custody of the New York State Department of Correction at the State Prison known as Sing Sing to serve an indefinite period of confinement not to exceed 2 1/2 years. On March 26, 1971 the defendant Richard Monell was resentenced in the Orange County Court. The sentence on March 5, 1971 was determined to have been illegally imposed. Assistant District Attorney Abraham J. Weissman appeared on behalf of the People

of the State of New York. Mr. Weissman made the following statements, among others:

> "Your Honor, the District Attorney's Office, since the prior sentence was imposed, has received a number of calls from responsible citizens from the County of Orange asking that leniency be extended to this defendant. . . . I feel, under the circumstances, perhaps this defendant should be given another opportunity, and if placed on Probation he would be his own judge and jury. . . ."

Thereafter the Court sentenced Richard Monell to probation and did not impose any period of confinement.

4. In or about June 1973, the August 22, 1972 Additional Grand Jury, duly impaneled and sworn in the United States District Court for the Southern District of New York was conducting an investigation into various alleged violations of Federal Criminal statutes concerning official corruption in Orange County, New York and adjacent counties and was specifically investigating any attempts to influence the enforcement of local gambling laws, fraud on the local government and obstruction of local law enforcement.

5. In or about February, 1975 the January 1975 Additional Grand Jury duly impaneled and sworn in the United States District Court for the Southern District of New York, commenced an inquiry to determine whether any violations of federal law had occurred, including an investigation into whether, among other things,testimony deliberately false had been given by witnesses before the August 22, 1972 Additional Grand Jury.

COUNTS ONE through THREE

The Grand Jury further charges:

1. On or about June 25, 1973, in the Southern District of New York, WILLIAM E. DOULIN, the defendant, having duly taken oath as a witness that he would testify truthfully before the August 22, 1972 Additional Grand Jury, a Grand Jury of the United States of America, duly impaneled and sworn in the United States District Court for the Southern District of New York and inquiring for that District, unlawfully, wilfully and knowingly and contrary to said oath, did make false material declarations, which he then and there well knew to be false, as hereinafter set forth.

2. At the time and place aforesaid, the Grand Jury was conducting an investigation into possible violations of Federal Criminal statutes concerning official corruption in Orange County, New York and adjacent counties, including, but not limited to, those laws prohibiting: attempts to illegally influence or obstruct the enforcement of local gambling

laws (Title 18, United States Code, Section 1511); any use of the mails in connection with any fraud on local government or any other person or entity (Title 18, United States Code, Section 1341); obstruction of local law enforcement and local government by improper influence of public officials (Title 18, United States Code, Section 1952); and conspiracy to defraud the United States and to violate the laws of the United States (Title 18, United States Code, Section 371).

3. It was material to said inquiry to determine whether the defendant WILLIAM E. DOULIN, had knowledge of and had participated with others in influencing and attempting to influence and approaching and attempting to approach any public officials and any law enforcement officials in Orange County, New York with regard to any criminal investigations, indictments, pleas of guilty, sentences, resentences or dispositions of such matters. More specifically, it was material to ascertain (a) whether the defendant had met with any persons or had had any conversations with any persons in which the defendant, directly or indirectly, influenced

or attempted to influence any public officials in Orange County, New York, (c) whether the defendant had in fact, directly or indirectly, asked, exacted, demanded, solicited, received, accepted or agreed to receive anything of value in return for his communicating with or attempting to influence any public or law enforcement official in Orange County, New York and (d) whether the defendant, by virtue of his position as Chairman of the Orange County Republican Committee, Orange County, New York had, in any way attempted to exert any influence on any public or law enforcement official in Orange County, New York.

4. At the time and place aforesaid the defendant WILLIAM E. DOULIN, appearing as a witness under oath before the said Grand Jury, did testify falsely with respect to the aforesaid material matters and did make the following false material declarations:

COUNT ONE

Q Let me turn to an area that is of principal concern to us which has to do with the enforcement of the gambling laws in your county among other counties, and let me focus on what the ultimate question is insofar as our interest in speaking with you, sir. We are concerned to know whether any public officials in Orange County ever received any money or any other kind of valuable things in return for playing any part in attempting to influence the local law enforcement in that county.

Do you understand that?

A I understand the question.

Q And my question I want to ask doesn't really go so much to hearsay and it's appropriate before a Grand Jury. Let me put this question to you: Have you personally, sir, ever in any way been involved in any conversation or discussion with anyone on the subject of you personally in any way receiving anything of value to help influence law enforcement and particularly gambling law enforcement in your county?

A Never.

COUNT TWO

Q I guess what I had asked you was and you started to answer, I asked you if there ever came a time when anyone had approached you to ask you to exert some influence or had offered you any money to try to exert influence in connection with the gambling laws.

A Nobody offered me money. I know that years ago, many people who were not in gambling at all now, asked me to see the -- would I go to see a judge or go see the District Attorney. But I never agreed to do it. Never spoke to any judge or District Attorneys in anybody's behalf. Now being in the undertaking business --

Q That means gambling or anything else.

A Gambling or anything else as far as that goes. Being in the undertaking business, people call me and ask me to help them. Like for instance, I have many calls on speeding tickets. Will I see a judge for that. Something like that. I have calls people say "my brother got arrested for drunk driving." I might tell them that I will see what I can do for them.

I have always set a rule. I don't see anybody, but I tell them that I might. That I'll see what I can do for them.

Now, this answers two purposes. After all, I'm in business. I may have buried in the family. I don't want to lose the family and don't want to create any hard feelings. At least I tell them I'll make an effort to see what I can do. But I've never yet approached a DA, an assistant or any judge for anyone.

Q For any purpose?

A For anything.

COUNT THREE

Q Mr. Doulin, has anyone ever at any time offered you any money or anything of value and you say that in its broad sense, to try to influence your conduct in any way whatsoever on anything, now that's a broad question and I don't mean to be unfair by it.

A I'll answer it. And I give you the privilege of looking up all bank accounts that you want to on my behalf that I have. The only thing that I ever had given to me was quite publicly. Malcolm Wilson, the Lieutenant Governor was a toastmaster at a testimonial dinner given for me two years ago. 750 people attended. They had to stop selling tickets three months before the affair was held. They gave me a testimonial dinner and presented me with a 1972 Cadillac. That was done publicly. That's the only thing of value that I ever received and that was done by my friends throughout both counties.

* * * *

Q Has anyone ever offered you anything of value or money or anything else?

A No.

Q Regardless of whether it was given with the exception of this testimonial you have told us about.

A No.

(Title 18, United States Code, Section 1623.)

COUNTS FOUR through SEVEN

The Grand Jury further charges:

1. On or about February 12, 1972 in the Southern District of New York, WILLIAM E. DOULIN, the defendant, having duly taken an oath as a witness that he would testify truthfully before the January 1975 Additional Grand Jury, a Grand Jury of the United States of America, duly impaneled and sworn in the United States District Court for the Southern District of New York and inquiring for that District, unlawfully, wilfully and knowingly and contrary to said oath did make false material declarations, which he then and there well knew to be false, as hereinafter set forth.

2. At the time and place aforesaid, the Grand Jury was conducting an investigation into possible violations of United States laws relating to allegations of official corruption and any illegal acts performed by public officials and people in quasi-public positions, in Orange County, New York, including, but not limited to,

those laws prohibiting: evasion of Federal income taxes (Title 26, United States Code, Section 7201); attempts to influence or obstruct the criminal justice system (Title 18, United States Code, Sections 201(d), 1503, 1510, 1511, 1952); any use of the mails or wires in connection with any fraud (Title 18, United States Code, Sections 1341, 1343); obstruction of justice (Title 18, United States Code, Section 1503); obstruction of criminal investigations (Title 18, United States Code, Section 1510); obstruction of local law enforcement (Title 18, United States Code, Section 1511); interstate travel and the use of interstate facilities including the mail with intent to violate federal or state bribery or extortion laws (Title 18, United States Code, Section 1952); giving false statements to any federal officer in a matter within the jurisdiction of any federal agency (Title 18, United States Code, Section 1001); making false material declarations before any Federal Grand Jury (Title 18, United States Code, Section 1623); and conspiracy to defraud the United States and to violate the laws of the United States (Title 18, United States Code, Section 371).

It was material to said inquiry to determine whether the defendant WILLIAM E. DOULIN, had knowledge of and had participated with others in influencing and attempting to influence and approaching and attempting to approach any public officials in Orange County, New York with regard to any criminal investigations, indictments, pleas of guilty, sentences, resentences or dispositions of such matters. More specifically, it was material to ascertain (a) whether the defendant had met with any persons or had had any conversations with any persons in which the defendant, directly or indirectly, influenced or attempted to influence any public or law enforcement officials in Orange County, New York, (b) whether the defendant had discussed with or had any knowledge of any plan to influence the decision of any public or law enforcement official in Orange County, New York, (c) whether the defendant had, directly or indirectly, asked, exacted, demanded, solicited, received, accepted or agreed to receive anything of value in return for his communicating with or attempting to influence

any public or law enforcement official in Orange County, New York, (d) whether the defendant, by virtue of his position as Chairman of the Orange County Republican Committee, Orange County, New York had, in any way attempted to exert any influence on any public or law enforcement official in Orange County, New York, (e) whether the defendant, WILLIAM E. DOULIN, had met with or had had any conversations with any public or law enforcement officials in the Orange County District Attorney's Office, including then Assistant District Attorney Abraham J. Wiessman, concerning the resentencing of a state criminal defendant Richard Monell identified in paragraph 3. of the introduction to this indictment and (f) whether the defendant had met with or had had any conversation with any persons, including Monell's grandmother, Jean Grant, concerning the sentencing and resentencing of state criminal defendant Richard Monell.

4. At the time and place aforesaid the defendant WILLIAM E. DOULIN, appearing as a witness under oath before the said Grand Jury, did testify falsely with respect to the aforesaid material matters and did make the following false material declarations.

Q You are talking about traffic tickets?

A Yes, traffic tickets it would be.

Q Has anyone ever come to you asking you to do a favor for them in any other kind of criminal case?

A No.

Q Never?

A Not that I know of.

Q When you say, "Not that I know of," you mean never?

A Never, yes; never.

Q Has anyone, at any time, come to you and offered you money if you would see someone in law enforcement, from a judge all the way through to a policeman - -

A No.

Q Let me finish the question. -- offer you money to see someone in law enforcement to try to influence a case or investigation, have you ever been offered money to do that?

A No

Q Never in your entire career?

A No

Q Have you ever solicited from anyone money in order for you to see someone in law enforcement to influence a case or investigation?

A No.

Have you ever had any discussions with anyone concerning people offering you money or anything of value for you to see someone in law enforcement to influence a case or an investigation?

A No

Q You understand when I say money in my prior questions I include anything of value --

A Yes

Q - - offered to you?

A I understand.

Q Has anyone offered you or have you ever solicited anything of value to be payed indirectly, for example, to the Republican Party, rather than directly to you - -

A No.

Q - - in exchange for you seeing someone in law enforcement and attempting to influence a case or an investigation.

A Never.

Q Nothing like that has ever happened?

A No.

Q No one has ever asked you to do that?

A No.

Q You have never solicited anyone along those lines?

A No.

COUNT FIVE

Q Have you directly and personally or indirectly, through someone else, interceded in any case in the criminal justice system in an attempt to influence the outcome of the case or investigation or the trial or whatever the pending - -

A Never.

Q You are absolutely certain about that?

A Yes

Q Did you ever try to use your influence in any way to affect the outcome of a criminal justice investigation or proceeding?

A Never

COUNT SIX

Q Did Mrs. Grant at any time ever have a discussion with you in which you agreed to intercede on behalf of her son, Richard Monell, in connection with a criminal case that was pending against him?

A No

Q Never had such a discussion?

A No.

* * * *

Q Did you ever have conversations with anyone, whether it be Mrs. Grant or another member of the family or anyone else, in which they asked you to intercede in Richard Monell's criminal case and to use your influence to assist Richard Monell?

A No.

Q Did you ever offer or volunteer to intercede on Mr. Monell's behalf in his criminal case?

A No.

COUNT SEVEN

Q Did you ever have a discussion with anyone in which you discussed interceding in Richard Monell's criminal case in order to assist Richard Monell and to use your influence to help him?

A No.

(Title 18, United States Code, Section 1623.)

FOREMAN

PAUL J. CURRAN
United States Attorney

Affidavit of Service

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The Daily Record

April 1, 1976

Re: United States of America v Doulin

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County of Monroe) ss.:
City of Rochester)

Ann M. Updaw

Being duly sworn, deposes and says: That he is associated with The Daily Record Corporation of Rochester, New York, and is over twenty-one years of age.

That at the request of

Herald Price Fahringer, Esq., Lipsitz, Green, Fahringer, Roll, Schuller and James

Attorney(s) for Appellant

On April 1st, 1976 (s)he personally served (2) copies of the printed ☐ Record ☒ Brief ☐ Appendix of the above entitled case addressed to:

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Bart M. Schwartz, Assistant U. S. Attorney
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☐ By hand delivery

Ann M. Updaw

Sworn to before me this 1st day of April 1976

~~Notary Public~~
Commissioner of Deeds